In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 858.

FLORIDA EAST COAST RAILWAY Company, *Appellant,*

v.

UNITED STATES, *Appellee,*

INTERSTATE COMMERCE COMMISSION, *et al.*, *Intervening appellees.*

APPEAL FROM THE COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

The order of the Commission in the first proceeding was complied with and is not in controversy here. July 3, 1907, a complaint was filed before the Interstate Commerce Commission in No. 1168, attacking the rates and certain regulations covering the shipment of citrous fruits, vegetables, and pineapples from Florida. After answers were filed and a full hearing, at which a vast amount of evidence was taken, the Commission, on June 25, 1908, filed its report. *Florida Fruit & Vegetable Shippers' Protective Association* v. *Atlantic Coast Line Railroad Co., et al.*, 14 I. C. C. R. 476.

The rates were considered under two divisions, viz, 1, a gathering charge from the points of origin to what were known as Florida base points, of which Jacksonville was the principal one; and, 2, rates from the base points to points of final destinations in other States, the sum of the two rates constituting the through interstate charge. The rates on oranges, vegetables, and strawberries from the basing points were reduced, but the gathering rates from the points of production to the basing points were not disturbed; nor were any of the pineapple rates or the rates for refrigeration disturbed. (See Appendix.)

The order of the Commission in the second proceeding was complied with and is not in controversy here. Two supplemental petitions were subsequently filed and, after notice and further hearings, the Commission, on June 12, 1910, rescinded that part of the report of June 25, 1908, which found that the local rates of 25 cents from points of production to base points were reasonable, and the unreasonableness of those rates were made the subject of further investigation. (R., 1187.) Subsequently, February 8, 1910, the Commission filed its second report in Nos. 1168 and 2566. *Florida Fruit & Vegetable Shippers' Protective Association* v. *Atlantic Coast Line Railroad Co., et al,* 17 I. C. C. R., 552.

In that report the rates on pineapples and citrous fruits from points of production on the Florida East Coast Railway Company were ordered reduced, and the proportional rates on citrous fruits and pineapples from the basing points to northern and eastern desti-

nations were likewise ordered reduced. (See Appendix.)

The order in controversy. Thereupon, the Railroad Commissioners of Florida filed complaint No. 3808, further attacking the rates on citrous fruits and vegetables from points of production in the State of Florida to the basing points. The commissioners also intervened in supplemental complaint No. 1168, and in that intervention attacked the same rates as in No. 3808. Answers were filed, and, after notice and full hearings, at which the question of the reasonableness of the rates on citrous fruits, vegetables, and pineapples from points of production to Jacksonville and other base points was fully and completely examined into, the Commission, on November 6, 1911, filed its third report and entered the order in controversy. (R., 33, 34, 35; see, also, Appendix.)

The orders in the first two proceedings were complied with by the appellant and all of the other carriers, and are not in controversy here. No complaint was ever made in any court by any carrier attacking the regularity of any order of the Commission in either of those proceedings (R., 861, 862), and no complaint was ever made in any court by any carrier, except the appellant, attacking the regularity of the order of the Commission in the last proceeding.

I.

The Interstate Commerce Commission accorded to appellant the full hearing provided by law and did not act arbitrarily.

The report of the Commission in Nos. 1168 and 3808, upon which the order in controversy is based, discloses that the railroad commissioners of Florida had held investigations in all parts of that State in which any of the railroad companies operated. (R., 22, 23.) In that proceeding all the gathering charges in the entire State of Florida, except the rates on pineapples then in force upon the line of the appellant, were under attack. The proceeding was instituted by, or had the support of, the railroad commissioners of Florida, whose duty it was, under the statute, to inquire into the reasonableness of interstate rates; and if, after investigation, it should be of opinion that any of the rates were unreasonable, to apply to the railroads operating within the State for a modification of the tariff; and, if unsuccessful, to institute proceedings before the Interstate Commerce Commission.

The present proceedings were against all of the gathering roads in the State and were instituted for the purpose of unifying the gathering rates throughout the State. The Interstate Commerce Commission gave notice of further hearings, and with the records in the old cases before it, it took about 500 additional pages of evidence.

The records of the Commission in the various proceedings which resulted in the present order were

offered in their entirety before the Commerce Court and received. They embraced over 2,000 pages, and were not printed for the use of the Commerce Court according to the rules.

At all times the appellant was represented before the Commission by its present counsel, who was assisted by the officers, traffic officials, and other agents of the appellant, and the records before the Commission consist largely of matter offered by the appellant. The various reports of the Commission (R., 19) and the opinion of the Commerce Court so indicate. (R., 1623.)

In the instant case, the appellant has stipulated out of the record all of the evidence taken by the Commission in the first two proceedings, and has further stipulated that the court may refer to the reports of the Commission as correct statements of the issues and facts of those proceedings. (R., 1649, 1650.) The statements attributed to counsel and the Commissioner taking the evidence in December, 1909, that the appellant's rates were not involved in those proceedings, are not in the present record, and it is beyond the power of the appellant to attack the present order by reason of anything which occurred in those proceedings. More than that, the alleged statements are of no consequence, or counsel would not have stipulated them away. The absence from the opinion of the Commerce Court of any reference to the alleged statements is conclusive that they were not seriously pressed at the hearing. The Commerce Court, however, reviewed fully the

various proceedings before the Commission. (R., 1633, 1634, 1635.) It is now beyond the power of the appellant to shake the presumptions in favor of the validity of the order. *Chicago, Rock Island & Pacific Railway Co.* v. *Interstate Commerce Commission*, 218 U. S., 88, 110, 111.

The order is also effective against the Atlantic Coast Line and the Seaboard Air Line companies, who were also parties to the proceedings before the Commission. Those companies appeared before the Commission with the appellant, occupied similar positions, had similar interests at stake, and were accorded the same treatment. During the season of 1910 the Atlantic Coast Line handled 2,901,936 boxes of citrous fruits and 1,500,000 miscellaneous crates; total, 4,401,936. The Seaboard Air Line handled 780,387 boxes of citrous fruits and 1,391,335 miscellaneous crates; total, 2,171,722. The appellant handled 669,584 boxes of citrous fruits, 600,000 crates pineapples, and 1,890,000 miscellaneous crates; total, 3,159,584. Thus, in the volume of traffic handled, the appellant stands between the Atlantic Coast Line and the Seaboard Air Line. (R., 913.)

Neither the Atlantic Coast Line nor the Seaboard Air Line joined in the petition before the Commerce Court. They forthwith published the rates and have since maintained them without protest. (R., 861, 862.) While at all times cognizant of the litigation, which, if successful, would inure to their benefit, neither company has ever intervened.

II.

The rates prescribed by the Commission are not confiscatory of the property of the appellant.

As to the charge that the rates prescribed by the Commission are confiscatory, it appears that appellant's railroad consists of two sections: (1) The line and branches from Jacksonville to Homestead, consisting of 506.47 miles, or the main line; (2) the line from Homestead to Key West, consisting of 122 miles, or the over-sea extension; total, 628.47 miles. (R., 904, 909.) It is so treated on the books of the company. (R., 1638.) The capitalization of the entire mileage consists of $10,000,000 of first-mortgage bonds, $21,000,000 [1] of second-mortgage bonds, and $5,000,000 of stock; total, $36,000,000 (R., 9); of this $15,000,000 applies to the main line and $21,000,000 to the over-sea extension. The entire capital stock is, and always has been, owned by Mr. Henry M. Flagler, and, as set forth by appellant in its application for a supersedeas, "no stockholders' meeting was necessary to determine his action."

For the year ending June 30, 1911, the net operating revenue from the main line was $1,272,908.19. (R., 904.) That sum, according to the showing made by appellant, would more than pay a dividend of 8 per cent on the capitalization of $15,000,000 for the main line (R., 1638); and, if so applied, would more than pay a dividend of 4 per cent on the total bonded

[1] When the petition was filed the total of the second-mortgage bonds was $20,000,000.

debt of $31,000,000 for the entire system. The president of the appellant company testified that the ordinary rate of interest on railroad stocks and bonds is less than 8 per cent, and runs from 4 to 5 and 6 per cent. (R., 758.)

For the year ending June 30, 1911, the entire operating revenue for the over-sea extension from Homestead to Knights Key was $97,787.94. From points between and including Jewfish Creek and Knights Key, the total revenue from tonnage amounted to $6,162.03 for the same period. For the period from January 22, 1912 (the date of the opening of the Key West Extension), to March 10, 1912, the total revenue at Key West from tonnage was $787.57. (R., 1068.) It appears conclusively, and the Commerce Court held, that the over-sea extension does not pay operating expenses, and the main line is burdened with the deficit. (R., 1640.)

As to the Key West Extension, it may be said that it consists of approximately 122 miles of railroad built from Homestead southward over the Florida Keys to Key West. The cost was approximately $175,000 per mile, or about $21,000,000. By the preamble of the act of the legislature authorizing its construction, it is recited that "Whereas the construction of the Panama Canal renders it desirable and important for the proper development of the State of Florida, and to secure the State a fair proportion of the traffic passing through the said canal, that a line of railroad should be con-

structed from the mainland of the State to the island of Key West." (R. 896.)

Appellant's witnesses testified before the Commerce Court that Long Key was a fishing ground, and the only thing that stands in the way of develment on the keys is lack of people; that Key Largo, the largest of the keys, is a little higher than the others; that the wind blew the water and spray clear over (the keys) until it killed the foliage, and caused the leaves to turn blue and drop, as if a blight had been through them; that the blight from salt water prevents profitable development, and that is the reason the keys are not populated. (R. 442, 560.)

It is conceded that the handling of the cars from the North into southern Florida, the loading of the cars, the handling of the citrous fruits, vegetables and pineapples, and the shipping thereof from southern Florida to the North, were not even among the considerations which resulted in the construction of the over-sea extension, which was built southward. (R. 764, 765.)

The reasonableness of the rates paid by the growers and shippers of southern Florida, whose freight is transported northward, should not be tested by a return of 8 per cent, or by what may or may not be a reasonable return, on the fair value of 122 miles of railroad built southward over the barren keys at a cost of $175,000 a mile, and which does not pay operating expenses, for the purpose of securing business

from the Panama Canal, not yet opened, or for some other purpose, though confessedly not for the use of these shippers.

In *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, it is said (596):

> It can not be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. * * * When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public.

In *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S., 541, it is said (p. 549):

> Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But

> whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. * * * The reasonableness of rates can not be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day.

On the subject of confiscation, the absence from the case of the Atlantic Coast Line and the Seaboard Air Line companies is again significant. As to them the rates have been published and maintained without protest as just and reasonable rates for the service rendered. If the appellant erred in its judgment in building a railroad over the barren keys, the growers and shippers of the State of Florida who ship in the opposite direction should not be called upon to pay the bill.

Findings of fact conclusive.—All questions sought to be raised are foreclosed by findings of fact beyond the power of any court to reexamine, and the Commerce Court, after examining the voluminous evidence before the Commission (R., 1633), was right in holding—

> This court, however, is not authorized to review the Commission's determination of

> disputed questions of fact, made after a full and fair hearing, on proper notice, unless its power has been exercised in an arbitrary or unreasonable manner or in violation of petitioner's constitutional rights.

The record is entirely void of a single distinct and dominant proposition of law which the Commission rejected, and the exact influence of which, in its decision, could be estimated. *Illinois Central Railroad Co.* v. *Interstate Commerce Commission*, 206 U. S., 441, 457.

On the authority of the numerous previous adjudications of this court in similar cases, the judgment should be affirmed.

WM. MARSHALL BULLITT,
Solicitor General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

JANUARY, 1913.

APPENDIX.

FIRST PROCEEDING.

ORANGES.

No. 1168. Florida Fruit & Vegetable Shippers' Protective Association *v.* Atlantic Coast Line Railroad Company et al. 14 I. C. C. R. 476.	(3,000,000 boxes, 80 pounds each, 1907-8, 12,000 carloads.) June 25, 1908, on complaint and answers duly filed, the following rates were considered:	Rail and water rates per box from basing point (Jacksonville) to..... All-rail rates to..... From shipping point (Arcadia) rate to basing point, Jacksonville..... Rates per box in carload lots from basing point to..... From shipping point (Arcadia) rate to basing point, Jacksonville..... After full consideration the foregoing all-rail rates for carload lots from basing points, minimum 300 boxes, were ordered reduced to..... Less than carload rates to remain 10¢. per box higher than carload rates to all points. The rates from basing points to Ohio River crossings were left undisturbed, with the suggestion that the carriers readjust them in accordance with certain suggestions of the commission.

	Balto.	Phila.	N. Y.	Boston.
Rail and water rates per box from basing point (Jacksonville) to.....	35¢.	35¢.	35¢.	40¢
All-rail rates to.....	47.5¢.	48.5¢.	50.5¢.	58.5¢.
From shipping point (Arcadia) rate to basing point, Jacksonville.....	25¢.	25¢.	25¢.	25¢.

	Ohio River.	St. Louis.	Chic.	Buff.	Pitts.
Rates per box in carload lots from basing point to.....	40¢.	54¢.	59.6¢.	60.8¢.	60.4¢.
From shipping point (Arcadia) rate to basing point, Jacksonville.....	25¢.	25¢.	25¢.	25¢.	25¢.

	N. Y.	Balto.	Phila.	Boston.	Pitts.	Buff.
After full consideration the foregoing all-rail rates for carload lots from basing points, minimum 300 boxes, were ordered reduced to.....	40¢.	43¢.	44¢.	51¢.	51¢.	51¢

VEGETABLES.

(In crates or barrels.)

Florida Fruit & Vegetable Shippers' Protective Association *v.* Atlantic Coast Line Railroad Company, et al. 14 I. C. C. R. 476.

June 25, 1908, on complaint and answers duly filed, the following rates were considered:

Rail and water rates on crates, 50 lbs. each, from basing point (Jacksonville) to	Balto.	Phila.	N. Y.	Boston.
	30¢	30¢	30¢	35¢
Reduced to	25¢	25¢	25¢	30¢

All-rail rates to	N. Y.	Boston.	Pitts.	Buff.	Chicago.
	43¢	53¢	31⅞¢	32. 4¢	33½¢

The all-rail rates were found to be reasonable.

Cabbages per bbl., 120 lbs. each, rail-and-water rate, Jacksonville to	Balto.	Phila.	N. Y.	Boston.
	54¢	54¢	54¢	63¢
The cabbage rate was reduced per bbl. to	44¢	44¢	44¢	52¢
Potatoes per bbl. 185 lbs. each, rail-and-water rate, Jacksonville to	60¢	60¢	60¢	70¢
Potatoes per bbl. reduced to	50¢	50¢	50¢	60¢

All rail rates, any quantity..... [Balto., Phila., N. Y.[Found reasonable. Boston. Reduced to not to exceed 6¢ per crate of 50 lbs. and 12¢ per bbl. of 100 lbs. over rate to N. Y.

Carload rates established upon vegetables per crate 50 lbs. from base points to	Balto.	Phila.	N. Y.	Boston.
	33¢	34¢	36¢	42¢

Florida Fruit & Vegetable Shippers' Protective Association v. Atlantic Coast Line Railroad Company, et al. 14 I. C. C. R. 476.

June 25, 1908, on complaint and answers duly filed, the following rates were considered:

PINEAPPLES.

Rail and water rates per box from Florida base points should be the same as oranges to.	Balto. 35¢.	Phila. 35¢.	N. Y. 35¢.	Boston. 40¢.
All rail rates per box, any quantity, should be the same as on oranges to	Balto. 47.5¢.	Phila. 48.5¢.	N. Y. 50.5¢.	Boston. 58.5¢.

Carload rates, min. 24,000 lbs., should be the same as on oranges to	N. Y. 46¢.	Balto. 43¢.	Phila. 44¢.	Boston. 51¢.	Pitts. 51¢.	Buff. 51¢.

The less than carload rates may exceed the carload rates by 10¢ per box.

STRAWBERRIES.

	Crates.	Per crate.	Revenue.
Present rates, carloads	200	$1.80	$360
Reduced to	175	1.80	270

SECOND PROCEEDING.

No. 1158. Florida Fruit & Vegetable Shippers' Protective Association *v.* Atlantic Coast Line R. R. Co. et al. (Lines north of Ohio River not parties.)

No. 2566. Florida Fruit & Vegetable Shippers' Protective Association *v.* Alabama & Vicksburg Ry. Co. et al. (Lines north of Ohio River were parties.)

Feb. 8, 1910, on complaints and answers duly filed, the following rates were considered.

No. 2566.

PINEAPPLES.

Proportional rates from Florida base points upon citrous fruits and pineapples, carloads, minimum 300 boxes, reduced in accordance with the following table:

Point.	Present rates.	Future rates.
	Cents.	*Cents.*
Chicago	59.6	53
Indianapolis	56.0	50
Cleveland	58.8	53
Milwaukee	62.0	55
St. Louis	54.0	50
Columbus	56.0	50
Minneapolis	77.6	66
St. Paul	77.6	66
Kansas City, Mo	71.6	62
Omaha	79.6	66
Cedar Rapids	72.8	62

Local rates from base points may exceed the proportional rates established by 3 cents per box in case of citrous fruits and pineapples.

Mixed carloads of fruits and vegetables were permitted, both the rate and the minimum to be that of the article which takes the highset rate.

No. 2566.

VEGETABLES.

By the original report the Commission suggested that carload rates should be established on vegetables which should not exceed the following in cents per crate to.....

Balto.	Phila.	N. Y.	Boston.
33¢.	34¢.	36¢.	42¢.

With corresponding rates to various interior destinations, the minimum to be 20,000 pounds or less. The carriers established carload rates 3 cents higher than than those suggested, minimum 20,000 pounds.

The rates so established by the carriers on vegetables, under ventilation, min. 420 crates, 21,000 lbs., were reduced to.....

Balto.	Phila.	N. Y.	Boston.
30¢.	37¢.	39¢.	45¢.

Under refrigeration, min. 350 crates, 17,500 lbs., to

Balto.	Phila.	N. Y.	Boston.
36¢.	37¢.	39¢.	45¢.

PINEAPPLES.

No. 1168.

Number of crates transported to market from Florida by the F. E. C. R. from 1905 to 1909 as compared to importations from Cuba, viz:

Year.	Florida.	Cuba.
1905	370 688	2,325,011
1906	574,035	2,302,189
1907	577,806	1,726,559
1908	640,829	2,322,304
1909	1,110,547	3,170,390

The average rate for the transportation of pineapples from the point of production to Jacksonville of 24.6 cents was readjusted and the average cost of transporting pineapples in carloads, crates, 80 lbs., min. carload, 300 crates, to Jacksonville reduced to about 21 cents, in accordance with the following table:

No. 1168. Florida Fruit & Vegetable Shippers' Protective Association *v.* Atlantic Coast Line R. R. Co. et al. (Lines north of Ohio River not parties.)

No. 2566. Florida Fruit & Vegetable Shippers' Protective Association *v.* Alabama & Vicksburg Ry. Co. et al. (Lines north of Ohio River were parties.)

Feb. 8, 1910, on complaints and answers duly filed, the following rates were considered.

Distance (miles).	Rate.	
	Carload.	Less than carload.
	Cents.	*Cents.*
Up to 40	9	12
Over 40 and up to 60	10	13
Over 60 and up to 80	11	14
Over 80 and up to 100	12	15
Over 100 and up to 120	13	16
Over 120 and up to 140	14	17
Over 140 and up to 160	15	18
Over 160 and up to 180	16	19
Over 180 and up to 200	17	20
Over 200 and up to 220	18	21
Over 220 and up to 240	19	22
Over 240 and up to 260	20	23
Over 260 and up to 280	21	24
Over 280 and up to 300	22	25
Over 300 and up to 325	23	26
Over 325 and up to 350	24	27
Over 350 and up to 375	25	28
Over 375 and up to 400	26	29

This table produces a through rate from the point of production in Florida to Chicago of 74 cents, as compared with the through rate of 73½ cents from the point of production in Cuba.

From Havana to Chicago the F. E. C. R. maintains a rate of 66½ cents.

Local rates from base points may exceed the proportional rates established, by 2 cents per crate in case of vegetables.

Mixed carloads of fruits and vegetables were permitted, both the rate and the minimum to be that of the article which takes the highest r te.

60 lbs. Florida Fruit & Vegetable Shippers' Protective Assn. v. Atlantic Coast Line R. R. Co. et al. No. 3885. Railroad Commission of the State of Florida v. Seaboard Air Line Ry. and Atlantic Coast Line R. R. Co.	Report and order in controversy. Nov. 6, 1911, on complaint and answers duly filed, and after full hearings, the following rates were considered: Carriers: Atlantic Coast Line, Seaboard Air Line, Florida East Coast Railway Co.	Previous proceedings before the Commission reviewed and considered and the entire rate structure reconstructed. Rates established for the transportation of pineapples, citrous fruits, and vegetables, in carload quantities, 21,000 lbs. minimum for pineapples and citrous fruits; 21,000 lbs. minimum for vegetables under ventilation; and 17,500 for vegetables under refrigeration, from points of production to Jacksonville, when destined for points beyond. Boxes, 80 lbs. in case of pineapples and citrous fruits, and 50 lbs. in case of vegetables.	The following mileage scale to apply to all traffic, viz:

Distance (miles).	Pineapples and citrus fruits.		Vegetables.		
	Carload.	Less than carload.	Under refrigeration.	Carload.	Under ventilation.
			Carload.		Less than carload.
Up to 40	9	12	7	6	8
Over 40 and up to 60	10	13	8	7	9
Over 60 and up to 80	11	14	9	8	10
Over 80 and up to 100	12	15	10	8½	10½
Over 100 and up to 120	13	16	10½	9	12
Over 120 and up to 140	14	17	11	10	13
Over 140 and up to 160	15	18	12	11	14
Over 160 and up to 180	16	19	13	11½	14½
Over 180 and up to 200	17	20	14	12	15
Over 200 and up to 220	18	21	14½	13	16
Over 220 and up to 240	19	22	15	13½	16½
Over 240 and up to 260	20	23	16	14	17
Over 260 and up to 280	21	24	17	15	18
Over 280 and up to 300	22	25	18	15½	18½
Over 300 and up to 320	23	26	18½	16	19
Over 320 and up to 340	24	27	19	17	20
Over 340 and up to 360	25	28	20	18	21
Over 360 and up to 380	26	29	21	18½	21½
Over 380 and up to 400	27	30	22	19	22
Over 400 and up to 420	28	31	22½	20	23
Over 420 and up to 440	29	32	23	20½	23½
Over 440 and up to 460	30	33	24	21	24
Over 460 and up to 480	31	34	25	22	25
Over 480 and up to 500	32	35	25½	22½	25½

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~950~~ 383

FLORIDA EAST COAST RAILROAD COMPANY,
APPELLANT,

vs.

UNITED STATES, RESPONDENT; INTERSTATE COMMERCE COMMISSION, APPELLEES.

BRIEF

Of the Intervening Appellees, Florida Fruit and Vegetable Shippers' Protective Association and East Coast Fruit and Vegetable Growers' Association.

A. A. BOGGS,
Counsel for Florida Fruit and Vegetable Shippers' Protective Association.

IN THE

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FLORIDA EAST COAST RAILROAD COMPANY, APPELLANT,

vs.

UNITED STATES, RESPONDENT; INTERSTATE COMMERCE COMMISSION, APPELLEES.

BRIEF

Of the Intervening Appellees, Florida Fruit and Vegetable Shippers' Protective Association and East Coast Fruit and Vegetable Growers' Association.

The issues presented on this appeal seem, upon examination, to reduce themselves to those presented by assignments numbers 1 and 2; that the court erred in holding that the Commission had power to fix the rates complained of, and that the rates are confiscatory. The 10th and 11th, assign-

ing error on the dissolution of the temporary injunction and on the dismissal of the bill, are merely the conclusions which must follow the sustaining of either of the first two contentions.

The 3d to the 9th assignments, inclusive, attack the opinion of the court instead of its decree, and address themselves to the argument stated by the court in support of its conclusion rather than to the conclusion itself.

Immateriality of Assignments.

It is unnecessary to argue the fallacy of this method of attack. The issue here is not whether this court will adopt the reasoning of that below, but whether the record supports its conclusion. Thus we might grant, for the sake of argument, that the main line of the petitioner's road does not end at Homestead and that its net revenues are less than 8 per cent on its investment, as in the 3d assignment; that the petitioner decided to construct its extension to Key West prior to 1902, as in the 4th; that the Interstate Commerce Commission was not justified in disregarding the value of the extension, as in the 5th; that there was no evidence before the Interstate Commerce Commission that conditions in 1911 were different from those in 1908, as in the 6th; that there was evidence to justify the court in holding that the extension produced an increase of traffic on the main line, as in the 7th; that there was no material increase in carload shipments as a result of the reduced rates from points of origin, as in the 8th; that the rates fixed by petitioner did not *increase* the burden on shippers on the main line from Jacksonville to Homstead; even if all this be true, yet the record shows that the rates on fruits and vegetables over petitioner's line were very high in comparison with those charged by other carriers, and that they put a heavy burden on shippers of this territory who are unable to meet the competition of other sections enjoying more reasonable rates

(14 I. C. C., 480; Beckwith, p. 1517); that they are higher than the rates voluntarily fixed by petitioner on lumber and other commodities which cost petitioner as much or more to handle (Beckwith, p. 1559); that the rates fixed by the Commission will yield a ton-mile earning of 21.78 mills (Burnside, pp. 906-908), and that the cost of the service rendered by the carrier is not more than 5 mills per ton-mile (Kirtland, p. 462); that petitioner is transporting Cuban pineapples from Key West to Jacksonville on an expedited schedule at a rate varying from 7.7 mills to 10 mills per ton-mile (rate 16 to 21 cents per crate of 80 pounds, according to destination, distance 522 miles), and is not losing money at it (Kirtland, pp. 471-537); that the cost to petitioner of its entire main line and branches from Jacksonville to Homestead, embracing all the territory producing fruits and vegetables, and paying the rates involved, did not exceed $15,000,000 (17 I. C. C., 564); that this line has a net earning from operation of $1,400,000; that the rates complained of would still allow the carrier more than double its average freight earning on other commodities (Beckwith, p. 1561); that the petitioner's rate on citrus fruits and vegetables was abnormally high (Beckwith, 1558); that the extension made no material contribution to the gross earnings of the road (St. Clair-Abrams, 1568); that it is in no way concerned in the fruit and vegetable traffic (Parrott, 765), and that appellant's previous rates were abnormal in their rapid increase for distance (17 I. C. C., 564).

We believe the record sustains every conclusion of the Commerce Court and the reasoning by which those conclusions are sustained, but regardless of that, we insist that the determination of the Commission on the facts cannot be shaken by a criticism of the reasoning by which the Commerce Court affirmed it.

I shall, therefore, not endeavor to follow counsel for appellant along the path of his assignments, but will confine myself first to a brief review of the case to show conformity to procedural requirements, and, second, to a discussion of

appellant's over-sea extension in its bearing on the question of confiscation as applied to these rates, the other features of the case being covered by other counsel.

History of the Case.

It is probable that few cases have been decided by the Interstate Commerce Commission upon a more comprehensive record than the one at bar. On the 2d day of March, 1911, Mr. Commissioner Prouty sat to take testimony in Jacksonville in two cases, No. 1168 (Florida Fruit and Vegetable Shippers Protective Association *vs.* Florida East Coast Railway Company, supplemental petition, Railroad Commissioners of Florida, intervenors) and No. 3808 (Railroad Commissioners of Florida *vs.* Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company).

As stated by Commissioner Prouty at the opening of the hearing, these cases brought into issue the rates generally on fruits and vegetables from producing points in Florida to base points. This hearing resulted in a combined record in the two cases exhibited here on pages 1510 to 1620, the portions applicable to the case against appellant occupying pages 1512, 1516-1527, 1531-1542, 1551-1570, and 1606-1608, or forty-four pages in all.

But this is only a fraction of the entire record before the Commission. The record already made in case No. 1168 and the entire record in case 2566 were stipulated in, thus adding some 2,500 pages, to say nothing of copious exhibits in both cases, and the entire series of annual reports on file with the Interstate Commerce Commission. It thus becomes apparent that the evidence, the sufficiency of which to sustain the Commission's order is in question, is not confined to the hearing of March, 1911, but includes every material fact relevant to these issues and contained in this great composite mass. It will perhaps be necessary to call attention to some of the facts brought out in this record, not so much to discuss their weight

as evidence, the determination of which is the province of the Commission, as to disprove the assertion of appellant that the finding of the Commission was without evidence to support it.

Florida's Rate Disadvantage.

Perhaps the most salient fact revealed is the universal discrimination in rates against Florida producers of fruits and vegetables as compared with their competitors. In regard to oranges, for example, the Commission says in its original report on case No. 1168 (14 I. C. C., 480), "considering the all-rail movement in the territory north of the Potomac and east of Buffalo and Pittsburg, it seems certain that the actual rate paid by California fruit is less per box than Florida, although the distance is twice as great." The through rate upon which the Commission based this criticism was that from Arcadia, Florida, a point on the Atlantic Coast Line Railroad. The rate from Miami was at that time 8 cents higher than the Arcadia rate, and from Homestead 16 cents higher, so that these points on the lower east coast could not ship their fruit far across the State lines in any direction without meeting competition from the distant Pacific coast at a heavy disadvantage.

In the vegetable markets conditions were almost as bad. The producers in southeast Texas and in southern Mississippi, although farther from the eastern markets than Florida, enjoyed far lower rates (14 I. C. C., 501). In fact, in the field of transportation it was an unvarying rule that Florida's competitors, no matter how distant from the market, or what might be their commodities, should have a substantial preference in rates.

It is against the policy of our law that such inequality should exist, unless in the given case there are other factors and conditions which render them necessary and unavoidable. The carriers, in the immense record compiled before the Commission, sought by testimony, exhibits and argument to show such circumstances and conditions, and, in the opinion of the Commission, they failed.

It is true that in the original case, No. 1168, the reasonableness of the rates of the appellant was sustained, but in that proceeding the shippers of this section were not represented, and in fact did not realize that the case was pending, only one grower from that great territory appearing (Record, 1151). But this case was retained by the Commission for further proceedings, and came to be taken up in connection with case No. 2566, into which its record was stipulated (17 I. C. C., 554). In the latter case, in which appellant was a party, rates from base points to market only were under consideration, and the Commissioner presiding informed counsel for this appellant at the first hearing that its rates were not involved. But the Commission was so impressed by the disastrous results there shown to be impending over these industries in the territory of appellant that of its own motion, by order dated January 12, 1910, it reopened the question of fruit and vegetable rates over the Florida East Coast Railroad from points of production to Jacksonville, and set a hearing in Washington in February, 1910, for testimony and argument, "with special reference, however, to pine apples" (Record, 1187).

In view of appellant's attempt to make it appear that there was a hiatus between the order of 1908, sustaining its rates, and that of December 2, 1911, reducing them, we desire to call the particular attention to this hearing of February 3 and 4, 1910, before the full Commission in Washington, which is of equal importance with that of March 2, 1911, as a foundation for the order complained of.

The Hearing of February, 1910.

The appellant was represented by its present leading counsel, by its president, and its traffic manager. The first step was to stipulate in, by mutual consent, the record in No. 2566. The shippers then introduced evidence covering 120 pages tending to show the heavy handicap of rate differentials against which Florida was struggling. The financial

condition of the road also was gone into, and it was proven that its capital was watered to the extent of some $4,000,000 (17 I. C. C., 564), and also that its net revenue was over 8 per cent on the actual cost of the property used in the service, and that they carried on business at a lower cost than the average of American railroads; also that their fruit and vegetable rates were vastly higher than their average on other commodities and than the rates they were willing to accept for the transportation of Cuban products.

Respondents put in testimony covering 158 pages in the endeavor to meet this evidence, and the case was then argued by counsel and submitted. See 17 I. C. C., 559, 561, 563, 565. Yet counsel for appellant, who personally conducted the case for his client at that hearing, says in his brief here, on page 13, that no additional testimony was offered, and again, on page 14, he says, "No additional testimony was taken at the hearing ordered for February 3, 1910," an error without apparent explanation or excuse.

On the case so submitted the Commission entered an order reducing appellant's rates materially on pineapples and citrus fruits, in fact establishing rates a trifle lower than those here under attack. Upon complaint by appellant, however, that, under the wording of the order setting the hearing, it was taken by surprise by the inclusion of citrus fruits, this order was modified and made applicable to pineapples only, and, so modified, was accepted and put into force by appellant, which shortly thereafter reduced its tariffs on citrus fruits and vegetables, but in so doing left them considerably variant from and higher than the rates established by the Commission on pineapples.

The Hearing of March, 1911.

A supplemental petition was now filed, asking that the rates on citrus fruits and vegetables be aligned with those on pineapples (Record, 1200), and upon the accumulated record of cases numbers 1168 and 2566, as well as upon that taken

at the hearing in March, 1911, the order complained of was based.

On page 18 of his brief counsel for appellant states that, at the hearing of March, 1911, the order reducing pineapple rates was taken as a conclusive argument why the rates on vegetables and citrus fruits should be reduced. This is misleading. The Commission had already adjudicated in case No. 1168, to which appellant was a party, that citrus fruits and pineapples should take the same rates, as a general rule (14 I. C. C., 503), and the same rule had been urged in argument by counsel for appellant in his brief filed with the Interstate Commerce Commission shown herein, where he says, "If the rate on pineapples is reduced, as required by complainant, this would have to be followed, necessarily, by a reduction to the same extent on vegetables, oranges, &c." (Rec., 1504). The Commission had also gleaned facts out of the record sufficient in its opinion to justify a like reduction on citrus fruits and pineapples in 1910, and had modified its order then made so as to withdraw citrus fruits from its effect only because appellant had complained that it was taken by surprise by the consideration of citrus fruits at the hearing of February 3 and 4 in Washington, and had not had an opportunity to present testimony on that point (Record, pages 1197, 1199). It was also abundantly established that the transportation of vegetables was carried on under similar conditions, and that from the shippers' standpoint the needs for reduction were the same. These matters were advanced by complainant not as conclusive, but as *prima facie* reasons for reduction, putting the burden on the carrier to show circumstances, if any existed, why a like rule should not be applied to citrus fruits and vegetables (Record, pp. 1512-1513). There is no showing in the record that the Commission adopted even this view, however.

It will be noted that complainant did actually introduce testimony at the hearing of March, 1911, and that the Commissioner presiding examined at length Mr. Beckwith, the vice-president and traffic manager of appellant, and elicited

from him an important array of facts as to cost of service, comparison of rates, expansion of traffic, and the general condition of the carrier, including the very significant admission that the cost of service was not greater for these commodities than for lumber and the like, upon which the carrier's rates voluntarily established were much lower (Record, p. 1559). See also pages 1517, 1558, 1561 and 1568 for significant and important facts brought out.

On pages 18 and 19 of his brief counsel for appellant recites a colloquy by which it would appear that at that hearing Mr. Commissioner Prouty limited the issue to the question of establishing carload rates, but an inspection of the record shows that these remarks had reference to case No. 3808, between the Railroad Commissioners of Florida and other carriers. They could have no application to the case against this appellant, which had already established a carload and less than carload tariff, as the Atlantic Coast Line and Seaboard Air Line had not, while the actual distance tariff of these other carriers was at the time far lower than the rates of appellant.

This is also true of the citation at the foot of page 20 of the brief, which, read in its context, applies entirely to case No. 3808, in which the Railroad Commissioners of Florida had in their petition suggested a schedule of rates, as they had not done in this case, and the *ex parte* statements which it is gratuitously intimated may have improperly influenced the Interstate Commerce Commission, evidently referred to these suggested rates of the Florida Commissioners, and not to those of appellant.

Again, on page 25 of his brief, counsel states that the Commission of its own accord reopened the case and declined to permit any additional testimony to be taken. We have already seen that about 300 pages of additional testimony were taken at the hearing immediately after the reopening, and the record shows that at the hearing of March 2, 1911, a great many important facts were brought out in the testi-

mony of Mr. Burr for the complainants and the statement of Vice-President Beckwith for appellant, portions of which have been previously cited. It shows, moreover, that no testimony offered by appellant was refused by the Commissioner presiding, who merely stated, as to certain testimony offered by both parties, that he thought it was unnecessary, that the record was already full, or that he did not believe that the Commission would be influenced by it. Certainly this offers no base for attack in the absence of a tender of evidence, a refusal, and an exception.

By the order complained of, the work of the Commission with reference to Florida rates was completed, and instead of the previous chaotic, arbitrary and excessive rates on Florida products there was established a logical system of distance tariffs covering the entire State of Florida from points of production to base points, equalizing those of appellant with those of the other Florida roads, and a comprehensive and consistent readjustment of rates from base points to markets. Of the two hundred defendants named in the several petitions, one hundred and ninety-nine obeyed the orders and established the new rates. There was but one recalcitrant, this appellant, which continued the fight, unmindful of the patent fact that if it should be so unfortunate as to be successful the rate differential, which would result in favor of the central and western portions of the peninsula, would inevitably, in the course of time, transfer the bulk of these industries, with their great tonnage of traffic, to other lines and ultimately kill the goose which lays the golden egg of its prosperity.

In view of all the foregoing, we contend that in the four distinct hearings making up this record, at all of which appellants were present, every procedural requirement was met and ample evidence was given to sustain the finding of the Commission.

The remaining point to which I will devote my attention is the question as to whether, as a matter of law, appellant is entitled to maintain high rates on the main line of Flor-

ida in order to provide for the operating charges and deficits of its over-sea extension, and so to put a serious and possibly permanent burden on the Florida shippers and deprive the East Coast of the opportunity to compete on equal terms with the producers of the other parts of Florida and the United States, whose railroads have no such burden to support. For a clear presentment of this point it is necessary to examine briefly into the physical and industrial characteristics of the several portions of appellant's line.

Character of Appellant's Line.

The branches of this line may be dismissed with a few words. That from Jacksonville to Mayport is about 30 miles long; it connects the city with several bathing resorts on the coast near the mouth of the St. John's river, while those from Titusville to Sanford and from New Smyrna to Orange City Junction, both quite short, traverse territory producing citrus fruits, and to some extent vegetables, and not dissimilar in character from the adjacent parts of the main line.

The main line extends parallel to the Atlantic coast some 495 miles from Jacksonville to Homestead. From this point its extension traverses the coastal marshes for some 19 miles and then crosses to Key Largo, along which it runs for some 16 miles, and thence, using the small coral keys for stepping stones, to Key West, a distance of some 91 miles.

The line on the mainland is of normal construction, practically free from grades and curves, and, as shown by its reports, and by Burnside's Exhibit 3 (Record, p. 904), and by the valuation exhibits, of low cost of construction and economical operation, the ratio of operating expenses to gross revenue being 62 per cent, as against an average for the railroads of the United States of 65 per cent, and decidedly advantageous compared with the other lines doing business in Florida, while its loss and damage ratio is likewise low in proportion. After leaving the mainland, construction proceeds with increasing difficulty and expense

until the last 90 miles into Key West have reached the stupendous cost of $175,000 per mile, with much of its permanent structure incomplete.

For the northernmost 50 miles the territory traversed is comparatively unproductive, and population sparse outside the cities of Jacksonville and St. Augustine; then comes the Hastings potato belt, extending some 25 miles. At about 100 miles the citrus fruit belt may be said to begin, although there is some production north of there, and it extends to the end of the main line, with some breaks. At about 225 miles pineapples begin, and from this point south vegetables come in, and in increasing volume, until Dade county is reached, which produces between the stations of Fort Lauderdale and Homestead more fruits and vegetables than any three counties in the State combined. At Detroit, a station situated at the edge of the marsh two miles south of Homestead, this traffic ceases abruptly, as the Keys are rocky and waterless, and so subject to salt water overflows and salt spray in storms as to be unfit for any considerable planting. It has been contended in argument, and suggested by Mr. Kirtland, who has been for four years general freight agent on the road, that considerable production may be expected on these keys in the future; but it is admitted by that witness, and by Mr. Carter, the master of ways and structures of the road, whose acquaintance with the territory is older than that of Mr. Kirtland, that the population and cultivation of these keys has diminished in the last few years in spite of the coming of the railroad (Record, pp. 489, 560).

South of Detroit there is no freight traffic worthy of consideration, the gross revenues from this source for the fiscal year ending June 30, 1911, being only $8,411.00 (Burnside, 903). There is no interchange of commodities between the mainland and Florida and the West India Islands. It is thus apparent that the only portion of defendant's line in any way employed in or concerned with the business of the people of Florida is that portion extending from Homestead to Jacksonville.

Cost and Capitalization of Road.

This line, with its feeders and branches, exclusive of the over-sea extension, is carried in the capital account of the company at about $17,000,000. Of this, as pointed out by the Interstate Commerce Commission (17 I. C. C., 564), $4,000,000 is water. The actual cost to the company, up to the time of the proceeding before the Commission, was about $13,617,652, or about $28,000 per mile (Chambers Ex., p. 879).

No showing was made before the Commission as to the cost of reproduction, but appellant introduced evidence before the Commerce Court which might possibly sustain the court's finding of a present valuation of some $17,000,000, though this increase is based chiefly upon the rise of values of real estate, and includes several millions for property which is certainly not shown by the records to be presently in use for railroad purposes.

The net revenue for 1910, which is all properly credited to the mainland portion of the road, the extension earning less than nothing, was about $1,400,000, and in 1911, a year of almost unprecedented crop failure, it was $1,272,000, the average of the two years being about $1,350,000, which would pay about 8% interest on the reproduction, or nearly 11% on the actual cost of the property. The reduction complained of would amount to about from $130,000 to $150,000 per year, which would still leave the carrier's earnings over 7% on the reproduction value and over 9% on the cost of the property used in the service. Surely this forms no basis for a claim of confiscation, even if confiscation could be predicated upon a reduction on one or two commodities, a point which will be discussed by other counsel.

But the actual contention made is that appellant is entitled, as a matter of law, to earn a return on its entire investment, and it is expressly urged that the Commission is without power to go into the question as to whether that

extension was wisely or unwisely conceived and constructed—whether it serves the shippers, upon whose traffic its maintenance is charged, or whether it now performs, or is capable of performing, any economic service commensurate with its cost.

Other counsel will deal fully with certain issues raised by this assignment, and in order to avoid any unnecessary duplication I shall devote the remainder of this brief to the point last suggested.

Appellant Has No Right to Burden Traffic of Main Line to Support the Extension.

As stated by counsel for appellant, there is a dearth of authority on the point. Of the three cases cited by him on page 41 of his brief, the first deals with the question of rates of grain elevators and the second with the taxation of telegraph companies. The third supports our contention, as far as it goes, holding that where the cost to carrier cannot be kept within reasonable limits the misfortune must fall upon him; while the four cases cited on page 29 seem to deal with the question as to whether courts, at the suit of a stockholder, will interfere with the policy of the management of a railroad company as to extensions, etc., and other irrelevant issues.

There is abundant authority for the proposition that a carrier is not entitled to burden traffic in order to pay a return on property unwisely constructed through unproductive territory or improvidently managed.

Reagan *vs.* Farmers Loan & Trust Company, 154 U. S., 412.

Covington *vs.* Sanford, 164 U. S., 578.

M., K., & T. R. R. Co. *vs.* Interstate Commerce Com., 164 Fed., 646, 648.

In re Arkansas rates, 169 Fed., 720, 733.

Southern Pacific *vs.* Bartine, 170 Fed., 725, 767.

San Diego L. & T. Co. *vs.* Jasper, 189 U. S., 439.

The apposite passages of these cases are quoted in the brief of counsel for the Railroad Commissioners of Florida (pp. 15 and 16), and, to avoid duplication, I cite them merely by reference.

If the doctrine laid down in these cases is correct, the Commission not only may, but must, examine into the wisdom or unwisdom of the investment where the issue is made on the carrier's right to charge exceptionally high rates in order to pay dividends on it.

And if this question may be considered as to the whole of a railroad, why may it not as to a part? If the Commission may fix rates which are not compensatory to the carrier on the ground that his whole line is built through sparsely settled territory where the traffic is too small to bear the burden, why may it not take that into consideration as to a portion?

Appellant somewhat naively complains that it is deprived of the right to earn a return on the $25,000,000 which the extension by this time has cost. The controversy in no way affects the revenues or earnings of the extension, which transports no fruits and vegetables except those from Cuba, upon which it has voluntarily established rates less than half as high as those complained of. It would make no difference in the earnings of the extension whether the rate on these commodities is doubled or halved. The real trouble is that the extension is unable to earn its own operating expenses, to say nothing of a return on the investment, and the order of the Commission deprives the carrier of the power to confiscate the property of these producers, who do not use it, to meet the deficit.

Freight Rates Cannot be Divorced from Basis of Service.

The trouble with appellant's logic is that it gets entirely away from the underlying reason for freight rates. Freight is essentially compensation paid to the carrier by the shipper for service performed, and a reasonable freight rate means

the reimbursement of the cost to the carrier plus a fair profit, including a return on the value of the property employed by him in that service, the total net to exceed the fair value of the service to the shipper. This rule is consistent with every sound rate case in the books.

It has been found by both the Interstate Commerce Commission and the Commerce Court that the cost of the service here in question is very small in comparison to the rate. As revealed by Mr. Kirtland's admission as to the profitableness of the Cuban traffic, the rate fixed by the Commission appears to be nearly three times the ton-mile cost of the transportation service.

As indicated by the Commission in its opinions, the old rates seem to be in excess of the value of the service to the shipper, but even admitting, for the sake of argument, they were not so, the particular point now under discussion involves primarily the question of the property upon which the carrier is entitled to a reasonable return. The answer, which we submit in all confidence, is "not all property which may belong to the carrier, not upon any piece of railroad which the carrier may purchase or construct, but upon that property, and only that property which is employed in the service rendered." To tax the goods of the shipper for the purpose of paying the carrier a return upon property which is built and employed for other purposes, which the shipper does not use and cannot use, and which either transports no commerce at all or exclusively that of producers of other localities, is not compensation; it is confiscation, not of the property of the carrier, but of the property of the shipper. This is the precise issue here. The over-sea extension of the Florida East Coast Railroad is as foreign to all of the uses and purposes of the producer of Florida as if it were built across Bering Sea. It is as indifferent to his interests as the Pyramid of Cheops. It is connected with him in no earthly way except that, like a vermiform appendix, it hangs on the system of his transportation.

The division at Homestead is condemned as arbitrary, but the Commission recognized only a physical and incontrovertible fact. From Homestead north the Florida East Coast Railroad transports fruits and vegetables and other freight for the people of its territory; from Homestead south it carries nothing which they produce or consume. From that point north it is a railroad normal in its construction, active in its traffic and useful to the population of its territory; from that point south it is a hobby, which may some day vindicate its conception by performing transportation service of some kind, but which at present is performing no service for anybody except in the transportation of passengers and mails. From Homestead north it is a railroad across the land; from Homestead south it is a railroad across the sea. The division was made at that point by the hand of God when He divided the waters from the land.

As representative of the shippers of the east coast, I am here to say to the court that our people are willing to pay a liberal return upon every dollar invested by Mr. Flagler for their benefit; they do not complain against allowing him the benefit of the increment of value in his property which their labors have helped to create and to paying a reasonable return even upon the values so increased. They will pay compensation, but they refuse tribute, and they invoke the constitutional guarantees against the taking of their property to maintain other people's business.

There was a time when this section monopolized the markets of the country, and the high prices obtained for its products made the burden of rates light; but now, from Cuba, from Porto Rico, from California, from Texas, from Mississippi, and from the central and western portions of Florida competition presses hard. We can carry no handicaps. We must ride as light as our rivals or lose the race. Already the pineapple industry has shrunk to 50 per cent of its former volume and the production of citrus fruits and vegetables is threatened with the same fate. The Interstate Commerce

Commission has unanimously held our contention just. The Commerce Court has unanimously upheld the Commission, and, conscious of the justice of our cause, we submit it for final decision by this august tribunal, confident that it will not close for us the door of opportunity and permit the builder of the over-sea extension to defy Nature and astonish mankind at our expense.

Respectfully submitted,

A. A. BOGGS,
Counsel of Florida Fruit and Vegetable Shippers' Protective Association and East Coast Fruit and Vegetable Growers' Association.

INDEX

CASES CITED

CITATIONS FROM RECORD

Supreme Court of the United States

OCTOBER TERM, 1912.

NO. 858

Florida East Coast Railway Co.
vs. Appellant.
The United States,
Respondent
Interstate Commerce Commission, et al.
Appellees.

On Appeal from the Commerce Court.

REPLY BRIEF OF APPELLANT.

At the time this Reply Brief went to press the attorney preparing it had not received all of the briefs of the appellees, but such as had been received appeared to be simply repetitions of the briefs submitted to the Commerce Court, but we submit not meeting the questions presented in the several assignments of errors discussed in the original brief of the appellant.

None of the briefs for appellees point out to this Court one word of testimony upon which the Commission based its decision that the rates which it declared reasonable in 1908 had become unreasonable in 1911, especially after the Florida East Coast Railway Company had voluntarily reduced these rates in July, 1910, and as a result it suffered a reduction of revenue of over $81,000.00 from vegetables alone. An examination of the testimony taken before the Commission at Jacksonville, Florida, March 2nd, 1911, shows that (pages 131-132 *et seq.* of unprinted testimony) Mr. Commissioner Prouty inquired of Mr. Beckwith, Vice President of the Company, whether or not the crops of fruits and vegetables had not enormously increased compared with ten years before, and he answered "Yes," and that he hoped there would be also an increase ten years later over what it was in 1911, and that he also expected there would be an increase in the passenger business. But this is not making rates based on existing business. In 1901 the fruit and vegetable business had not recovered from the disastrous freezes of 1894-1895, which had practically killed to the ground nearly every citrus tree in the State, and the succession of severe

winters following had also prevented a recovery of the vegetable industry in the State. To base rates on fruits or vegetables on probable increases in the face of the evidence as to the great fluctations in the volume of these crops, due to climatic causes, which must necessarily continue and over which the railroad company cannot exercise the slightest control, is, we submit, unjust and unreasonable.

Mr. Commissioner Prouty, representing the Interstate Commerce Commission, at the hearing in Jacksonville, Florida, said, referring to the decision in 1908 (page 1514 of this record):

> "Commissioner Prouty: I do not know how my associates may have viewed this matter before, but in my own mind it did not seem to me upon the former hearing that these railroads in Florida were earning at that time perhaps a fair income upon the investment; but it did seem to me that upon the rates which we approved, as the business developed, they would earn a handsome return upon their investment. Now, if we scale down the rates as fast as business develops, that time will never come."

On the same page of the record, discussing the same question and the same rate of 1908, Mr. Commissioner Prouty said:

> "That is what the Commission had in mind when it established these carload rates on pineapples on the Florida East Coast. Now, Mr. Beckwith thought that those rates were too low. Mr. St. Clair-Abrams thinks they are too low now, because they do not allow his road suffi-

cient revenue, and perhaps they do not today; but considering that business and the extent of it, and all the facts before us, we thought that year after year, good years and bad years, the road ought to accord to the shipper that rate because it was reasonable as rates go in other places, but we did not reach that conclusion altogether nor very largely upon an examination of the financial condition."

The briefs of the appellees not only fail to show upon what testimony the Interstate Commerce Commission acted in declaring unreasonable in 1911 the rates they declared reasonable in 1908 and rendering the opinion that they did not see how these roads could operate for a less price, but they also fail to explain upon what theory the Interstate Commerce Commission possessed the power to receive ex parte testimony or statements after the hearing in the case had closed without affording opportunity to the Florida East Coast Railway Company to meet these ex parte statements, or to cross-examine the persons making these statements, and use them as ground for further and drastic reductions. Was there due process of law in doing this? Did the appellant have its day in Court? Was not this act in direct conflict with all the adjudications of this Court that counsel have been able to find?

Are rates to be based, not upon the business existing at the time of making them, but upon speculative theories of what it may be in years to come? The language of Mr. Prouty admitting that the rates declared reasonable in 1908 do not perhaps allow the road sufficient revenue today must not be forgotten,

as the Commission subsequently reduced those very rates after a previous voluntary reduction while they admitted the conditions were unchanged. We are unable to imagine anything more unreasonable than this action.

Neither does any brief of the appellees explain the positive conflict between the decision of the Interstate Commerce Commission on one vital question and the opinion of the Commerce Court. The Interstate Commerce Commission solemnly affirmed the fact that between 1908, when it declared the existing rates reasonable, and 1911, when it declared the same rates unreasonable, the condition of the appellant's road was unchanged. The Commerce Court, without any evidence before it, says in effect that the Interstate Commerce Commission must have been mistaken, as the conditions could not have been the same to have warranted the further reduction in rates made. The effect of this conflict is in many respects amusing. The Interstate Commerce Commission says in its opinion that the conditions are unchanged but we reduce the rates. The Commerce Court says in effect that the Interstate Commerce Commission is mistaken, that the conditions must have been different and must have been changed or the reduction would not have been made. To sustain the reduced rates fixed by the Interstate Commerce Commission the Commerce Court has been compelled to hold that there must have been a changed condition and that there necessarily must have been evidence before the Interstate Commerce Commission to show a changed condition or the Inter-

state Commerce Commission could not reasonably have reduced the rates, and the Commerce Court has so held in direct conflict with the solemn opinion of the Interstate Commerce Commission without one word of evidence before it to show that there was any change whatsoever in the condition of the appellant's road, save that the condition was not as favorable for further reductions of rates than existed in 1908.

Neither do the briefs of the appellees sustain the contention of the Commerce Court that there is no evidence to show that the building of the extension has increased the passenger traffic of this road. We showed to the Court that for the fiscal year ending June 30th, 1909, soon after the extension to Knights Key had been put in operation, the passenger business of the road was $319,547.07, less than it was for the fiscal year ending June 30th, 1911, when the extension to Knights Key had been put fully in operation. We also showed (pages 1077-1078 of record) that the business for the fiscal year ending June 30th, 1912, up to March 14th, 1912, showed a decrease in freight earnings and an increase of passenger earnings. The testimony of Mr. Parrott (page 738 of record) shows that when the steamers ran three times a week from Miami to Havana they would leave Miami with forty, fifty, sixty, eighty or ninety passengers; that when they had an excursion (which necessarily meant reduced rates) they might run one hundred and fifty to one hundred and eighty passengers; that after the extension had been completed to Knights Key, with steamers running six days in the week, the boats would leave with from

one hundred and seventy to two hundred and forty passengers per day, exclusive of excursions. Taking the average number of passengers three times a week at sixty-five for each boat from Miami, or one hundred and ninety-five for the week, we have an increase to an average of two hundred and five passengers for each steamer or an average of one thousand, two hundred and thirty as against an average of one hundred and ninety-five, and this was still further increased after the road was completed into Key West on the 22nd day of January, 1912. For every effect there must be some cause. What else besides this extension could have produced such an enormous increase of the passenger business to and from Havana? And this is all the more noticeable (if the Court will permit us) from the fact that for the fiscal year ending June 30th, 1912, as shown by the annual report of the company, while the freight decreased 2.38% or decreased from $2,150,048.31 to $2,098,830.38, the passenger business increased 19.43% or from $1,465,230.91 to $1,749,973.65, or an increase of about $284,500.00; while, as shown on the exhibit (page 1098 of record) the passenger business for February, 1912, alone, increased $67,000.00 over the preceeding year, while the freight business decreased $22,986.00 below the previous fiscal year. For the fiscal year ending June 30th, 1909, the extension to Knights Key had not been long in operation, and consequently the increase of passenger business was small, but during the winter of 1909-10, it was in full operation and the number of boats had to be increased from three to six per week

to and from Havana. For the fiscal year ending June 30th, 1909, the entire passenger traffic of the road was $1,158,391.10. For the fiscal year ending June 30th, 1911, the passenger traffic had increased to $1,465,230.91, a gross increase of $306,839.81. For the fiscal year ending June 30th, 1912, the passenger traffic had increased to $1,749,973.65, being an increase of $284,742.74 over the preceding year, or an aggregate of $591,582.55 increase over the fiscal year ending June 30th, 1909, or more than 50% increase over the passenger business when the terminus of the line was temporarily at Miami, rendering necessary the doubling of the steamer service to Havana and each steamer carrying an average of four or five times as many passengers as when the line ran from Miami.

As an illustration (if the Court will permit it, although we admit dehors the record, but sustaining the contention of Mr. Parrot, the President and Mr. Kirtland of the Florida East Coast Railway Company) this winter a special line of steamers from Key West to Colon has been announced, and before the close of last year more than 1200 passengers had been booked for this trip, 99% of them from points North of Jacksonville and every one necessarily having to travel over the extension to Key West, and returning, while the bookings for Havana continue to increase, showing the immense benefit conferred upon the main line by this extension.

In the testimony offered by the Interstate Commerce Commission, a Mr. Burnside testified as an expert accountant (pages 853-4-5-6 of record) and

seems to have partly based his figures on percentages and by arbitrarily (we suppose under instructions from his clients) figuring the terminus of the road at Homestead. On cross examination, however, he had to admit that from Miami to Knights Key, for the fiscal year ending June 30th, 1911, the main line received a gross revenue of over $258,000.00 from this extension, but stated he had not ascertained the amount contributed by the extension to the passenger traffic. It is notable that Mr. Burnside made the freight earnings rather more than the appellant did.

AS TO THIRD ASSIGNMENT OF ERRORS.

None of the briefs of appellees meets the third assignment of errors. We submit that they fail to cite the evidence upon which the Commerce Court based the opinion that the main line of appellant's railroad ends at Homestead. Neither have they cited the evidence upon which the Court held that the net revenues on this alleged main line were, for the fiscal year ending June 30th, 1911, in excess of 8% on the present fair value of the property. To the extent that any valuation was attempted at all, it showed a valuation from the standpoint of appellees of about $17,000,000.00. In the brief for the Interstate Commerce Commission before the Commerce Court (page 40) they admitted an aggregate valuation of $17,041,950.49. Eight per cent on this would be, in round figures, $1,363,280.00. The net earnings of the road were only $1,317,000.00 for that fiscal year, of which over $25,000.00 represented

interest paid on money deposited. So that, as a matter of actual, cold-blooded fact, the entire net earnings, based on this valuation, would have been only $1,292,000.00, or less than 8%, and that, too, entirely ignoring the extension to Key West or Knights Key and the business brought to the balance of the main line by such extension.

FIFTH ASSIGNMENT OF ERRORS.

The appellees have utterly failed in any of their briefs to meet the objection raised on the fifth assignment of errors. The effect of the decision of the Commerce Court is that the extension from Homestead to Key West must earn, in its local business alone, enough to make it pay not only expenses but a fair profit on the cost of this extension, as the Interstate Commerce Commission is authorihed to disregard the value of this extension and the business accruing to the balance of the main line from it, in fixing rates from Jacksonville to Homestead|. As this extension has cost, up to the present time, some $20,000,000.00, then it follows as a matter of course that if this contention be sustained the capital expended on the extension is rendered permanently valueless, for as fast as this extension increases the business of the line from Homestead to Jacksonville the Interstate Commerce Commission will have the right to reduce the rates on so much of the main line, the more especially if present value is to be disregarded and the Plant Account alone considered. The effect would be to force the East Coast to operate the extension from Homestead to Key West as a sepa-

rate and distinct entity, to ignore it as a part of a continuing main line to deep water at Key West, and to permanently deprive the investor of the capital of one cent of profit on the investment. If this holding of the Commerce Court is sustained then it can be applied to any part of a road which of itself does not produce, in its local business, much revenue. Between Jacksonville and St. Augustine, a distance of 40 miles, the local business is very small, both in freight and passengers. Along the line of road are long stretches of territory for many miles which do not produce enough local business to pay the running expenses of a single train. If one portion of the main line of a road can be picked out to be ignored and the capital invested in it confiscated, why not another? These are pregnant matters which none of the appellees in their briefs have met and which we insist must be considered by this Court.

The brief of the Interstate Commerce Commission is simply a repetition of the brief presented to the Commerce Court and repeats the same one-sided statements peculiar to that brief. As an illustration (page 12 of the brief), counsel cites Mr. Kirtland, Traffic Manager of the Florida East Coast Railway Company, as giving the minimum cost of transportation at ½ cent a ton per mile and immediately fixes the profit of the East Coast at 12 mills per ton per mile. Mr. Kirtland simply gave the common estimate of the GreatTrunk Lines as to the actual cost of transporting freights generally and did not refer to the particular fruit and vegetable freight, for in addition to the cost of hauling (which

he referred to) was and is the cost to the East Coast of $5.00 per car for the hire of the particular cars needed for transporting fruits and vegetables, the additional cost of nearly 100 spurs and tracks into the groves and farms and the annual expense of maintaining the same, and the added cost of maintenance of tracks, ties, etc., none of which were embraced in Mr. Kirtland's answer, and all of which must be considered in arriving at a conclusion as to the reasonableness of a rate. All of these questions were discussed and considered in 1908 when the Interstate Commerce Commission held the higher rates reasonable and declared that the Commission could not see how the East Coast could transport these fruits and vegetables at a lower rate.

In the Arkansas Rate Case, cited by both appellant and appellees, 156 U. S. 649, *et seq.*, this Court held that the company would be entitled to relief if the rates fixed were such as to practically destroy the value of its property. The Commerce Court admitted that the effect of the rates fixed by the Interstate Commerce Commission would be to cause a reduction of $131,000.00 per annum in the revenues of the company, based upon the large yield in 1911 and which we showed fluctuated largely, and, to sustain the rate, held that the Commission was not required to consider the extension from Homestead to Key West in establishing rates, the effect of which was and is to completely destroy the value of the property of the company from Homestead to Key West. It must be borne in mind that in these Arkansas rate cases the companies had increased the

rate of freight, while the East Coast had not simply held to the rate declared reasonable in 1908 but had actually reduced those rates after the road had been extended to Knights Key and there had been a large increase of revenue from passenger traffic resulting therefrom. Necessarily, it is practically impossible (as the Court held in those cases) to ascertain the exact cost of transporting any particular article of freight, but the evidence in this case shows that it costs much more to handle fruit and vegetables than it does to handle non-perishable freight. For instance, the trains carrying fruits and vegetables are limited to 25 cars as against 45 to 60 cars carrying non-perishable freight. The speed of these fruit and vegetable trains approximate that of passenger trains and the consumption of fuel is greater. Furthermore, is the extra expense of the hire of a particular kind of cars and the expense of spurs and switches into the groves and farms; all these being in addition to the ordinary expense incurred in hauling non-perishable freight. It is therefore absolutely necessary to ascertain the entire earnings and expenses to determine whether or not the particular rate involving a large reduction of revenue is or is not confiscatory.

With the higher rate the fruit and vegetable industry prospered; the area of land put into cultivation increased, affected only by climatic conditions which, as is shown by the testimony, produced enormous fluctuations in production regardless of the extent of acreage.

If the right to earn a reasonable profit (which this Court has repeatedly affirmed) holds good in this case, then it was and is confiscation which would reduce the interest on $20,000,000.00 of bonds from 4% to 3% in 1911 and in 1912 to less than 2%. If the decision of the Commerce Court is sustained, the Florida East Coast Railway Company will have to refund to the shippers of fruits and vegetables something approximating in the neighborhood of $100,000.00, roughly estimated, for the fiscal year ending June 30th, 1912, or ½% of the interest of 2½% declared on the $20,000,000.00 of second mortgage bonds, reducing this interest to 2%. Is not this confiscation?

In the short time at the command of counsel preparing this reply brief it is impossible to discuss at any length the brief for the Interstate Commerce Commission. On pages 34, *et seq.*, in this brief, however, counsel attempts to argue that the Commission did not so arbitrarily exercise its power as to transcend the authority conferred by the statute. Now, let us see; neither the Interstate Commerce Commission nor the Commerce Court had any new evidence before it to show that the rates declared reasonable in 1908 and which were reduced voluntarily in 1910 had become unreasonable in 1911 by reason of any changed conditions on the Florida East Coast Railway. They decided the question in 1911 on the testimony given in 1908. The Interstate Commerce Commission decided that the conditions were unchanged; that while the aggregate business of the road had increased, its earnings had increased

to as great an extent. When, therefore, it ordered a reduction in these rates, did it not do so without evidence and was not this act the exercise of power so arbitrarily as to virtually transcend the authority conferred by the statute?

As with the brief of the Florida Railroad Commission, counsel has failed to point out the evidence upon which the Interstate Commerce Commission exercised its authority in making the reduction complained of.

In the brief for the State Railroad Commission of Florida it is contended, as it was before the Commerce Court, that because only particular commodities are affected and because we had not separated the intrastate from the interstate business, the Court could not consider the rate complained of. As it is very seldom a general revision of rates is made, if this proposition be correct, then all the different Railroad Commissions need do is to continue reductions of particular classes of freight, since if the entire business of a road is not to be considered because only particular classes of freight are affected it never would be possible for a railroad to obtain relief.

In the case of Mo. K. & T. Ry Co. vs. Love 177 Fed. Rep., page 493, this very same point was raised before Circuit Judge Hook, who granted a temporary injunction, and dissented from this view, saying on page 502: "Moreover the rates in question should properly be considered as a body and in connection with the other freight rates of the company not affected by the orders."

As regards the intrastate traffic, the testimony in this case shows that this is so small as to be almost negligible. Practically all of the fruits and vegetables produced on the line of the East Coast Railway are shipped from the point of production to other states, while practically everything used on the line of the road is brought from other states. In his testimony before Mr. Commisioner Prouty, in 1911, (page 1535 of the Record) Mr. Burr, Chairman of the State Railroad Commission, admitted that the intrastate traffic in fruits and vegetables was "a mere nothing as compared with the interstate." And this fact was further sustained by the testimony of Mr. Kirtland, General Freight Agent of the Florida East Coast Railway Company. It follows, therefore, that the contention of counsel in this regard is altogether untenable.

Again, Florida being a terminal state with its line of road entirely within the State of Florida, it has no through business. There is but little or no difference between the cost of its intrastate and that of its interstate business, and in this respect it differs materially from the two other principal roads in the State, viz.: the Atlantic Coast Line and the Seaboard Air Line Railway, each of which has lines running through six different states and does an immense through business. The great mass of the South-bound business on the East Coast originates at Jacksonville from freight delivered to it by other roads, while practically all of its North-bound business originates on its own line of road from Key West North.

THE ISSUES NOT MET.

The appellees have utterly failed in their briefs to meet a single substantial objection raised by the assignments of errors. They have failed to show wherein the Interstate Commerce Commission was vested by the law with the power to make the rate complained of in the face of the evidence offered at the hearing in 1908, and the lack of evidence in 1911, to show any changed condition of affairs which would render the rate declared reasonable in 1908 unreasonable in 1911, bearing in mind also the radical reduction of the same rates voluntarily made by the appellant in 1910.

(2) They have failed to show upon what law the Interstate Commerce Commission or the Commerce Court was vested with authority to determine that the extension from Homestead to Key West should not beconsidered in the making of rates or that there was any traffic along the entire main line which justified its construction.

(3) They have failed to show wherein the extension imposed a burden on the balance of the line from Homestead to Jacksonville when the testimony is undisputed and indisputable that after this extension had been completed, and notwithstanding its great cost, the rates on all classes of freights were reduced and the rates on the particular fruit and vegetable freights complained of had also been reduced 15% in the aggregate and a much larger percentage in the territory where the great mass was and is produced, and that, instead of the extension proving a

burden upon the balance of the line, its effect was to reduce those burdens and to enable the company to voluntarily make reductions in 1910.

(4) In not one of the briefs is any law or authority shown which warrants either the Interstate Commerce Commission or the Commerce Court to judicially condemn the construction of the extension from Homestead to Key West and to eliminate it entirely from consideration in the fixing of rates.

(5) In not a single brief of the appellees is any evidence cited to sustain the contention of the Commerce Court that the conditions in 1911 were any different from those existing in 1908.

(6) Not one of the appellees referred to the evidence showing the enormous increase of business from Key West to Havana as compared with the business done when the line of steamers ran from Miami to Havana. They have ignored the evidence that while the freight business, including the appellant's own freight (which amounted to over 5% of the gross) increased only some 20% between 1909 and 1912, that the passenger business of the road increased, during the same period of time, over 51%, of which less than ½% was on account of the appellant, and that after the extension was completed to Knights Key it became necesary to put on a daily line of steamers to and from Havana while at Miami three steamers per week were sufficient, and that the daily line carried four times as many passengers each trip from Knights Key as they did from Miami.

CONCLUSION.

We submit in conclusion that not a single brief of the appellees explains why and upon what authority in law or in fact there has been this ruthless confiscation of then $16,000,000.00 and now $20,000,000 of values. There has been no explanation conflicting with that of the evidence offered by the appellant to show that the extraordinary increase in passenger earnings was caused by this extension. If this increase had not been followed by the great increase proven in the travel to and from Havana, there might have been some ground for the oipnion of the Commerce Court, but the evidence of this increase was before the Commerce Court and undenied and could not possibly have been caused by anything but this extension.

Respectfully submitted,

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